

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
July 8, 2004 Session

**MICHAEL GUFFY, ET AL. v. TOLL BROTHERS
REAL ESTATE, INC., ET AL.**

**Appeal from the Chancery Court for Williamson County
Nos. 29063, 28956, 29541 R.E. Lee Davis, Chancellor**

No. M2003-01810-COA-R3-CV - Filed October 27, 2004

Toll Brothers Real Estate, Inc., and Wilson Concord, L.P., (collectively “Toll Brothers”),¹ seek review of the trial court's order denying Toll Brothers’ motion to compel arbitration. Michael Guffy and his wife, Rosemary Guffy, along with other² plaintiffs (all plaintiffs being herein collectively referred to as “the Guffys”), filed separate complaints against Toll Brothers alleging, among other causes of action, that they were fraudulently induced to enter into an Agreement of Sale (“the Agreement”) with Toll Brothers for the construction and purchase of a residence. A provision in the Agreement provides that disputes between the parties would be submitted to arbitration. Based upon this provision, Toll Brothers moved to stay the court proceedings and to compel arbitration. The trial court denied Toll Brothers’ motion, finding that the arbitration provision did not apply to the Guffys’ claim of fraudulent inducement to enter into the contract. The trial court also held that the arbitration provision was invalid because it was not initialed or additionally signed as required by the Tennessee Uniform Arbitration Act (“the TUAA”). Arguing that the Federal Arbitration Act (“the FAA”) governs the parties’ arbitration agreement, Toll Brothers appeals. We vacate the trial court’s order denying arbitration and remand for further proceedings.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court
Vacated; Case Remanded**

¹ As far as the issues before us are concerned, the relationship between these two entities is immaterial. Suffice it to say that our holdings pertain with equal force to both entities.

² Three other couples brought similar lawsuits against Toll Brothers based upon the same contract documents. These suits were consolidated by two of this court’s orders, *i.e.*, the order of October 7, 2003, which consolidated the matter of *Guffy et al. v Toll Brothers Real Estate, Inc., et al.* with that of *Primm, et al. v. Toll Brothers Real Estate, Inc., et al.* C/A No. M2003-01812-COA-R3-CV, and the order of November 13, 2003, which consolidated the Guffy matter with that of *Michael Felks, et al. and Glen Fine, et al. v. Tolls Brothers Real Estate, Inc., et al.*, C/A No. M2003-02496-COA-R3-CV. The consolidated cases proceeded under the number assigned to the Guffy litigation by the appellate court clerk. Since all four lawsuits before us have common contract documents and common issues of law, we will refer to the plaintiffs collectively as “the Guffys.” The differences in the cases are not relevant to the issues before us, and consequently we will limit our background discussion to that of the Guffy matter. However, our holdings with respect to the Guffys apply with equal force to all four cases.

CHARLES D. SUSANO, JR., J., delivered the opinion of the court, in which HERSCHEL P. FRANKS, P.J., and D. MICHAEL SWINEY, J., joined.

C. Dewees Berry, IV and Kristin J. Hazelwood, Nashville, Tennessee, for the appellants, Toll Brothers Real Estate, Inc., and Wilson Concord, L.P.

Jean Dyer Harrison, Nashville, Tennessee, for the appellees, Michael Guffy and wife, Rosemary Guffy; Joseph Primm and wife, Jacqueline Primm; Michael Felks and wife, Jennifer Felks; and Glen Fine and wife, Theresa Fine.

OPINION

I.

In 1998, the Guffys entered into the Agreement for the construction and purchase of a residence in Toll Brothers' Brentwood Glenn community in Williamson County. The Agreement contains an arbitration provision, which reads as follows:

Buyer hereby agrees that any and all disputes arising out of [the Agreement], the Home Warranty³ or the construction or condition of the Premises shall be resolved by binding arbitration in accordance with the rules and procedures of the American Arbitration Association or its successor (or an equivalent organization selected

³The "Home Warranty" referenced in this provision is expounded upon by another provision of the Agreement, which reads as follows:

LIMITED WARRANTY: SELLER AGREES TO PROVIDE BUYER A 10 YEAR LIMITED WARRANTY (THE "HOME WARRANTY"). A COPY OF THE HOME WARRANTY IS AVAILABLE AT THE SALES OFFICE. EXCEPT AS EXPRESSLY SET FORTH IN THE HOME WARRANTY, SELLER SHALL HAVE NO LIABILITY OR OBLIGATION WHATSOEVER AFTER SETTLEMENT WITH RESPECT TO THE PREMISES OR THIS AGREEMENT. SELLER'S LIABILITY UNDER THE HOME WARRANTY OR THIS AGREEMENT OR ARISING IN ANY WAY OUT OF THE CONSTRUCTION, DELIVERY, SALE OR CONDITION OF THE PREMISES SHALL BE LIMITED TO THE REPAIR OF THE PREMISES IN ACCORDANCE WITH THE HOME WARRANTY STANDARDS. IN NO EVENT SHALL SELLER BE LIABLE FOR ANY SPECIAL, EXEMPLARY, INDIRECT OR CONSEQUENTIAL DAMAGES. SELLER HEREBY SPECIFICALLY EXCLUDES ANY OTHER WARRANTIES, EXPRESS OR IMPLIED, INCLUDING WITHOUT LIMITATION, IMPLIED WARRANTIES OF MERCHANTABILITY, HABITABILITY, WORKMANSHIP AND FITNESS FOR A PARTICULAR PURPOSE.

(Capitalization in original). However, a copy of the "Home Warranty" is not contained in the record before us.

by Seller). In addition, Buyer agrees that Buyer may not initiate any arbitration proceeding for any claim arising out of the Agreement or the Home Warranty or relating to the construction or condition of the Premises unless and until Buyer has first given Seller specific written notice . . . and given Seller a reasonable opportunity after such notice to cure any default, including the repair of the Premises, in accordance with the Home Warranty. The provisions of this paragraph shall survive settlement.

At closing, the Guffys signed a “registration” form (“the Home Buyer Acknowledgment”) in which the Guffys acknowledged receipt of the Toll Brothers Limited Warranty.⁴ The Home Buyer Acknowledgment also contains an arbitration provision, which provides, in relevant part, as follows:

I/we acknowledge and agree all disputes under and relating to the Limited Warranty (including disputes on which issues are to be submitted to arbitration; alleged breach of the Limited Warranty; and alleged violations of statutes or regulations relating to consumer protection or unfair trade practices) shall be submitted to binding arbitration before an independent third party arbitration organization. I/we agree the decision of the arbitrator(s) shall be binding on all parties. Any such binding arbitration(s) shall be conducted in accordance with the rules and procedures applicable to the arbitration organization hearing the dispute or, where those rules are silent, the United States Arbitration Act (9 U.S.C. § *et. seq.*).

The Guffys took possession of their residence on or about August 28, 1998. Subsequently, the Guffys claimed that there were construction defects and deficiencies in the structure, citing significant structural defects and water intrusion that had caused mold growth throughout the house.

The Guffys filed suit against Toll Brothers on August 27, 2002, seeking rescission of the Agreement on the ground that they were fraudulently induced to enter into the Agreement by virtue of Toll Brothers’ misrepresentations as to the quality of construction of the home. Their complaint also alleged breaches of contract, violations of the Tennessee Consumer Protection Act, negligence, fraud, and negligent or fraudulent/intentional misrepresentation.⁵

Based on the arbitration provisions contained in the Agreement and the Home Buyer Acknowledgment, Toll Brothers moved to stay the proceedings and sought an order compelling

⁴We assume, but do not know for sure, that the “Toll Brothers Limited Warranty” is the same as the “Home Warranty.” In view of our disposition of this appeal, we do not have to resolve this question.

⁵The Guffys were the only couple to enter into a settlement agreement with Toll Brothers. Consequently, they were the only party to allege fraudulent inducement to enter into this separate agreement.

arbitration. The Guffys filed a motion to quash the demand for arbitration based on the fact that the arbitration provision was not initialed or additionally signed as required by a provision of the TUAA, codified in Tenn. Code Ann. § 29-5-302(a) (2000).⁶ Additionally, the Guffys argued that the allegations in their complaint bearing upon the issue of contract formation are not appropriate for arbitration under Tennessee law; rather, they assert that claims of fraudulent inducement to contract must be submitted for judicial resolution. Following argument, the trial court entered an order granting the Guffys' motion to quash the demand for arbitration, and denying Toll Brothers' motion to compel arbitration. On June 12, 2003, Toll Brothers filed a "Motion to Revise Non-Final Judgment under Rule 54.02 or, in the Alternative, to Alter or Amend Under Rule 59.04 the Judgment Entered." The trial court denied this motion without a hearing on June 16, 2003. Toll Brothers appeals.

II.

The issue before us is one of law. Therefore, our review is *de novo* on the record of the proceedings below and there is no presumption of correctness as to the trial court's conclusions of law. *T.R. Mills Contractors, Inc. v. WRH Enter., LLC*, 93 S.W.3d 861, 864 (Tenn. Ct. App. 2002). The general issue presented here is whether the trial court erred in denying Toll Brothers' motion to compel arbitration. Although an appeal as of right typically must address a final judgment of a trial court, *see* Tenn. R. App. P. 3(a), this appeal is before us as of right under the TUAA, which provides that an appeal may be taken from an order denying an application to compel arbitration. Tenn. Code Ann. § 29-5-319(a)(1) (2000). *See also T.R. Mills*, 93 S.W.3d at 864-65.

In the instant case, the propriety of the trial court's decision hinges upon whether the FAA governs the parties' agreement to arbitrate, thereby preempting Tennessee law or whether the TUAA applies. The United States Supreme Court has determined that where the FAA applies, claims of fraudulent inducement to contract must proceed to arbitration; under the FAA, only claims of fraudulent inducement to enter into the *arbitration provision* must be submitted for judicial resolution. *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 403-4, 87 S.Ct. 1801,

⁶Tenn. Code Ann. § 29-5-302(a) provides as follows:

A written agreement to submit any existing controversy to arbitration or a provision in a written contract to submit to arbitration any controversy thereafter arising between the parties is valid, enforceable and irrevocable save upon such grounds as exist at law or in equity for the revocation of any contract; provided, that for contracts relating to farm property, structures or goods, or to property and structures utilized as a residence of a party, the clause providing for arbitration shall be additionally signed or initialed by the parties.

18 L.Ed.2d 1270 (1967).⁷ However, Tennessee courts have adopted the dissent in *Prima Paint* and held that allegations of fraudulent inducement to enter into the contract as a whole are not appropriate for arbitration. *City of Blaine v. John Coleman Hayes & Assoc., Inc.*, 818 S.W.2d 33, 38 (Tenn. Ct. App. 1991). Therefore, where Tennessee law governs, a party seeking rescission of a contract based on fraudulent inducement to contract is entitled to judicial resolution of that claim. *Frizzell Construction Co. v. Gatlinburg, L.L.C.*, 9 S.W.3d 79, 85 (Tenn. 1999).

The trial court did not state with specificity whether it believed that the FAA or the TUAA governs the parties' undertakings. The trial court appears to have concurred in the Guffys' argument that the arbitration clause did not contemplate the arbitration of a claim of fraudulent inducement to contract, and that the arbitration provision does not satisfy the prescriptions of the TUAA in that it is not separately initialed or signed. Toll Brothers contends that the trial court erred when it denied its motion to compel arbitration because the provisions at issue are governed by the FAA. Therefore, according to Toll Brothers, since the FAA requires that claims of fraudulent inducement to contract be submitted to arbitration, and since the FAA, if applicable, would preempt the provision of the TUAA calling for an arbitration provision to be additionally signed or initialed, the dispute between the parties, again according to Toll Brothers, should be submitted to arbitration.

Given the complexities of these arbitration acts and the necessity of determining which applies, we must first explore, as relevant, the interplay between the FAA and the TUAA.

III.

Section 2 of the FAA provides that

[a] written provision in any maritime transaction or a *contract evidencing a transaction involving commerce* to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

9 U.S.C. § 2 (1999) (emphasis added). The phrase "involving commerce" has been interpreted as being the functional equivalent of "affecting commerce," which, in turn, is the language typically

⁷The Guffys contend in their brief that the reasoning of *Prima Paint* was overruled by the Supreme Court's subsequent decision in *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 115 S.Ct. 1920, 131 L.Ed.2d 985 (1995). However, *First Options* neither expressly nor impliedly overrules or even addresses the Supreme Court's decision in *Prima Paint*. Rather, the *First Options* opinion only addresses the question of whether arbitrators or courts have the power to determine if parties agreed to arbitrate the merits of a dispute. The Supreme Court in *First Options* simply held that the resolution of this issue depends upon the parties' agreement as to who would arbitrate the issue of arbitrability. *Id.* 514 U.S. at 943-44. The issue addressed in *First Options* is simply not before us.

employed by Congress to invoke its constitutional power to regulate *interstate* commerce. *Frizzell*, 9 S.W.3d at 82 (emphasis added). Thus, as used in 9 U.S.C. § 2, the word “commerce” refers to “interstate” commerce.

A court may find that the FAA governs either (1) where the parties consented in the agreement that the FAA would apply, or (2) where the court determines that the contract “involv[es] [interstate] commerce.” Once a court determines that the FAA applies, it must proceed under the rubric of the federal act. However, under Tennessee law, if the parties *expressly* agree that their contract will be governed by Tennessee law, the parties’ agreement controls even in the event the contract “evidenc[es] a transaction involving commerce.” It has been held that, “[s]ince Congress did not want state and federal courts to reach different outcomes about the validity of arbitration, the FAA, if it applies, preempts state law and state courts cannot apply state statutes that invalidate arbitration agreements.” *Pyburn v. Bill Heard Chevrolet*, 63 S.W.3d 351, 357 (Tenn. Ct. App. 2001).

A.

As “arbitration is a matter of contract,” a court must apply ordinary contract principles to determine whether the contracting parties agreed to submit certain claims to arbitration, and whether they agreed as to the law that would govern the arbitration process. *Frizzell*, 9 S.W.3d at 84. As the United States Supreme Court has stated,

[a]rbitration under the [FAA] is a matter of consent, not coercion, and parties are generally free to structure their arbitration agreements as they see fit. Just as they may limit by contract the issues which they will arbitrate, so too may they specify by contract the rules under which that arbitration will be conducted.

Id. (quoting *Volt Info. Sciences, Inc. v. Bd. of Trustees*, 489 U.S. 468, 479, 109 S.Ct. 1248, 103 L.Ed.2d 488 (1989)). The question therefore becomes “what the contract has to say about the arbitrability of the petitioner’s claim” *Pyburn*, 63 S.W.3d at 357 (quoting *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 58, 115 S.Ct. 1212, 131 L.Ed.2d 76 (1995)). If the parties agreed to arbitrate under the FAA, a claim must be submitted to arbitration even if that claim would not be subject to arbitration under Tennessee law. *Id.* For, as one court held,

[a]s a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration...To that end, “the heavy presumption of arbitrability requires that when the scope of the arbitration clause is open to question, a court must decide the question in favor of arbitration.”

Id. (quoting *Am. Recovery Corp. v. Computerized Thermal Imaging, Inc.*, 96 F.3d 88, 92 (4th Cir. 1996)(citations omitted)).

Therefore, to gauge whether parties intended for the FAA to apply, the courts must rely upon the “cardinal rule” in interpreting contracts, which is “to ascertain the intention of the parties and to give effect to that intention, consistent with legal principles.” *Frizzell*, 9 S.W.3d at 85 (quoting *Bob Pearsall Motors, Inc. v. Regal Chrysler-Plymouth, Inc.*, 521 S.W.2d 578, 580 (Tenn. 1975)). The intention of the parties should be gauged by considering the terms of the contract, its subject matter, and the “construction placed on the agreement by the parties in carrying out its terms.” *Id.* (quoting *Penske Truck Leasing Co. v. Huddleston*, 795 S.W.2d 669, 671 (Tenn. 1990)). The court in *Frizzell* applied such an analysis to conclude that although the relevant arbitration provision extended to “[a]ll claims, disputes and [sic] or other matters in question arising out of, or relating to, this Agreement,” the inclusion of a Tennessee choice of law clause demonstrated the parties’ intention to withhold from arbitration a claim of fraudulent inducement to contract, and, instead, to submit this issue to a court, as contemplated by Tennessee law. *Id.* 9 S.W.3d at 81, 85.

In the instant case, the relevant language in the Home Buyer Acknowledgment provides that “all disputes under and relating to the Limited Warranty...shall be submitted to binding arbitration,” and “[a]ny such binding arbitration(s) shall be conducted in accordance with the rules and procedures applicable to the arbitration organization hearing the dispute or, *where those rules are silent, the [FAA].*” (Emphasis added). The record before us includes the Agreement and the Home Buyer Acknowledgment, but, significantly, it does not include the Home Warranty, a document referred to in the Agreement and apparently also referred to in the Home Buyer Acknowledgment. Thus, there are at least three contract documents pertaining to the construction and purchase of the Guffys’ residence. Since we do not have one of these documents and since all contract documents need to be considered in determining whether the parties expressly agreed that the FAA would apply to their arbitration provision, *see T. R. Mills*, 93 S.W.3d at 870 (citing *McCall v. Towne Square, Inc.*, 503 S.W.2d 180, 183 (Tenn. 1973)), we must defer, initially, to the trial court for a resolution of the issue of whether or not the parties have expressly agreed to submit to arbitration under the FAA. A remand to the trial court is required for this determination.

If it is determined that the parties have consented to be governed by the FAA, the allegation of fraudulent inducement to enter into the *whole* contract must be submitted to arbitration, as the Tennessee Supreme Court has recently held,

[p]arties may agree to arbitrate claims of fraudulent inducement despite prohibition of arbitration of such claims under Tennessee law, and because the parties...specifically agreed that the FAA governs the arbitration clause, they agreed to arbitrate the claim for fraudulent inducement of the contract.

Taylor v. Butler, No. W2002-01275-SC-R11-CV, 2004 WL 1925423, at *1 (Tenn. filed August 31, 2004). Only claims specifically challenging the arbitration clause itself, on grounds of fraud or unconscionability, are appropriate for judicial resolution under the FAA. *Id.*, at *4. Therefore, should a trial court determine that the FAA governs by virtue of the parties’ agreement, the issue of

fraudulent inducement to contract goes to arbitration, and the initialing/signing requirement under the TUAA is preempted because it does not apply to all contracts, but simply to agreements to arbitrate. See *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 281, 115 S. Ct. 834, 130 L.Ed.2d 753 (1995).

B.

If, based on all of the relevant contract documents, the trial court determines that the parties did not expressly agree that the FAA would govern their arbitration agreement, the court must then go further and determine whether the FAA applies because the “contract evidenc[es] a transaction involving commerce,” thereby bringing it within the ambit of the FAA, since it is clear that the parties did not expressly agree that Tennessee law would apply. Where an agreement is silent as to the choice of law, but provides that claims arising out of the contract will be submitted to arbitration, the FAA will control if the contract involves interstate commerce. *Allied-Bruce*, 513 U.S. at 274, 278. It is not necessary that the parties contemplated that the contract would involve interstate commerce; rather the FAA merely requires that a contract *affect* interstate commerce and that there was interstate commerce in fact. *Id.* (emphasis added). Consequently, in *Allied-Bruce*, the United States Supreme Court reversed an Alabama Supreme Court decision to apply Alabama’s arbitration scheme, which invalidated written, pre-dispute arbitration agreements. *Id.* at 269. The Alabama court held that the FAA did not apply because the parties did not contemplate interstate commerce upon entering into the agreement. *Id.* at 274, 278. However, the United States Supreme Court articulated a new test that redefined the scope of “involving commerce” and “evidencing a transaction.” *Id.* Consequently, the multistate nature of the company and the fact that materials used by the company to carry out the terms of the contract came from outside of the state sufficed to bring the contract within the ambit of the FAA. *Id.* at 282.

Therefore, as interstate commerce need only be “present in fact,” Tennessee courts have found interstate commerce by considering factors such as the location of the respective parties, the involvement of out of state contractors and laborers, the locations from where materials were purchased, and the source of financing. See *Frizzell*, 9 S.W.3d at 83; *Tenn. River Pulp & Paper Co. v. Eichleay Corp.*, 637 S.W.2d 853, 855 (Tenn. 1982).

Toll Brothers conditions its appeal on the argument that the Agreement evidences interstate commerce. In support of its argument, Toll Brothers attached an affidavit from Toll Brothers’ corporate counsel enumerating the ways in which interstate commerce was involved in these matters. However, whether the allegations of interstate activity are true, and, if true, whether they suffice to bring this matter within the ambit of the FAA, are questions for the trial court on remand. The trial court must decide whether the contract and the manner in which it was performed involved interstate commerce. Should the court determine that the undertakings between the parties “evidenc[e] a transaction involving commerce,” the FAA applies and, consequently, a claim of fraudulent

inducement to enter into the contract as a whole must be submitted to arbitration.⁸ *See Prima Paint*, 388 U.S. at 404.

IV.

The Guffys argued before the trial court that the arbitration provisions were without effect because neither the arbitration provision contained in the Agreement nor that found in the Home Buyer Acknowledgment were “additionally signed or initialed by the parties” as required by the TUAA.⁹ Tenn. Code Ann. § 29-5-302(a). Toll Brothers proffered that *Prima Paint* required that the Guffys’ claim of fraudulent inducement be submitted to arbitration.¹⁰ The trial court denied Toll Brothers’ motion to compel arbitration, finding that the arbitration provision contained in the Limited Warranty was too narrow to include, within its ambit, allegations of fraudulent inducement to contract. As previously noted, the trial court did not make any particular findings as to whether or not the FAA or the TUAA applied.

⁸ In their brief, the Guffys contend that even if the contracts “evidenc[e] a transaction involving commerce,” the FAA is not necessarily implicated. The Guffys argue that a contract may implicate the interstate commerce requirement yet be non-arbitrable. The Guffys argue that their position is supported by the language of 9 U.S.C. § 2 – that an agreement “shall be valid, irrevocable, and enforceable save upon such grounds as exist at law or in equity for the revocation of any contract” – when read in conjunction with the Supreme Court’s language in *Allied-Bruce* that “[s]tates may regulate contracts, including arbitration clauses, under general contract law principles and they may invalidate an arbitration clause ‘upon such grounds as exist at law or in equity for the revocation of any contract’.” *Allied-Bruce*, 513 U.S. at 281. The Guffys therefore seem to suggest that this case presents a situation where a state court may decline to apply the FAA on state law grounds. However, that argument is unavailing when the cited language from *Allied-Bruce* is read in context. The following sentence in *Allied-Bruce* limits the ability of states to regulate agreements to arbitrate:

What States may not do is decide that a contract is fair enough to enforce all its basic terms . . . but not fair enough to enforce its arbitration clause. The [FAA] makes any such state policy unlawful, for that kind of policy would place arbitration clauses on an unequal “footing,” directly contrary to the [FAA]’s language and Congress’ intent.

Id. (citing *Volt Info. Sciences, Inc.*, 489 U.S. at 474. This language contemplates that state statutes, such as the one relied upon by the Guffys to invalidate the arbitration provision, cannot be used to invalidate such provisions *unless those laws are equally imposed on contracts in general*.

⁹ Toll Brothers responded by arguing that, since the signatures affixed to the Home Buyer Acknowledgment itself are immediately below the paragraph containing the arbitration provision, this satisfied the requirements of the TUAA. However, the trial court found this argument to be without merit, and so do we.

¹⁰ In its memorandum in support of its motion to compel arbitration, Toll Brothers argued that in signing the Home Buyer Acknowledgment, the parties agreed to be bound by the FAA. However, in argument, Toll Brothers relied primarily upon their assertion that the signature on the Home Buyer Acknowledgment satisfies the additional signing requirement, and that the decision of *Prima Paint* required that the Guffys’ claim of fraudulent inducement be submitted for arbitration.

Without knowing the basis for the trial court’s decision, we are unable to rule on the question of law put before us by Toll Brothers, that is, whether the trial court erred in denying its motion to compel arbitration. The FAA would apply (1) if the parties expressly agreed it would apply, or (2) in the absence of such an agreement and in the absence of an agreement that Tennessee law would apply, if the parties’ contract “evidenc[es] a transaction involving commerce.” Based upon the record before us, we cannot make a determination on either issue. The record before us is lacking, as it does not include all of the contract documents. It is not appropriate for this court, at an appellate level, to make findings of fact relative to whether the parties’ agreement involved interstate commerce. As we find “complete justice cannot be had by reason of some defect in the record,” we find it is appropriate to remand this action to the trial court “for further proceedings, with proper directions to effectuate the objects of the order, and upon such terms as may be deemed right.” Tenn. Code Ann. § 27-3-128 (2000).

We direct the trial court to determine two issues bearing upon the question of which one of the two statutory schemes applies in this case. First, the trial court should determine if the parties expressed their intention that the FAA would govern their arbitration agreement. If the trial court finds that the parties did not expressly consent to be bound by the FAA, the trial court must then determine whether the Agreement “evidenc[es] a transaction involving commerce,” thereby compelling the application of the FAA under 9 U.S.C. § 2. If it is ultimately determined that the FAA governs, then, under the dictates of *Prima Paint* and its progeny, the Guffys’ claim of fraudulent inducement to enter into the whole contract must be submitted to arbitration. In the absence of an allegation of fraudulent inducement to enter into the *arbitration provision*, there is nothing under the FAA to submit for judicial resolution. Additionally, under the rubric of the FAA, the TUAA provision relied upon by the Guffys, which requires that the provision be additionally signed or initialed, would be without effect as it is preempted by the FAA.

V.

The Guffys argue that Toll Brothers’ argument that the FAA governs arbitration in this matter was waived because, according to the Guffys, Toll Brothers failed to raise the issue in the trial court. In particular, the Guffys proffer that nowhere in the pleadings does Toll Brothers raise the issue of the applicability of the FAA. However, we find that Toll Brothers did raise the argument. Based on the record before us, Toll Brothers proceeded on two theories in the trial court – that the signature just below the arbitration provision in the Home Buyer Acknowledgment satisfies the additional signing/initialing requirement of the TUAA, and that the Guffys’ allegation of fraudulent inducement with respect to the contract as a whole was subject to arbitration under the FAA, as the Home Buyer Acknowledgment evinces the parties’ intent to be governed by the FAA. It is well-settled that this court “can only consider such matters as were brought to the attention of the [trial court], and acted upon or pretermitted by him.” *Clement v. Nichols*, 209 S.W.2d 23, 23 (Tenn. 1948). However, in this case, we believe that the applicability of the FAA was placed before the trial court. Accordingly, the Guffys issue of waiver is found to be without merit.

VI.

The judgment of the trial court is vacated. This case is remanded to the trial court for further proceedings, consistent with this opinion. Costs on appeal are taxed to the appellees, the Guffys, the Primms, the Felks, and the Fines.

CHARLES D. SUSANO, JR., JUDGE